

The Law on Corroboration in Fiji and Vanuatu

By Sofia Shah

In any criminal case evidence is required to find a person guilty of an offence or to acquit the person of the alleged offence. Common law has developed rules as to how evidence should be adduced through witnesses once they take oath to tell the truth and nothing but the truth. The general principles are that upon the evidence adduced by the parties the court would decide whether to find the accused guilty or not. However, as there are exceptions to every principle this rule of convicting upon any evidence have exceptions too. The common law recognizes that there are occasions where it would be perilous or dangerous to convict a charged person solely on the evidence of one witness unless the evidence is supported by some other independent evidence. This supportive evidence is termed as “corroborative evidence” or corroboration.

Corroboration simply means support or confirmation.¹ In relation to the law of evidence, corroboration refers to any rule of law or practice which requires that certain kinds of evidence be confirmed or supported by some other independent evidence in order to be sufficient to arrive to a verdict. Sometimes one wonders if someone is telling the truth and we are more likely to believe them if their evidence is supported by some other evidence. This supporting evidence can be either stated in writing or orally delivered in Court.

The common law and the statutes of the country normally state when corroborative evidence will be required by the Court of law. Initially under the common law and the statute laws corroboration was required in sexual offences, unsworn evidence of the child, evidence given by an accomplice and in cases of treason and perjury. In this paper I will consider the requirement of corroboration in the South Pacific countries in sexual offence cases, unsworn evidence of the child and evidence of accomplice. I will further discuss how these are being applied specifically in Fiji and Vanuatu through common law and statutory provisions.

¹ Peter Murphy, *Murphy on Evidence* (7th ed, 2000) 544.

Law on Corroboration in Fiji Islands

In Fiji, corroboration is recognised and provided for by the Evidence Act, the Crimes Decree 2009 and the Criminal Procedure Decree 2009. The Evidence Act, Cap 41 provides that if a statement is provided by the maker of the statement and is admissible it is not to be treated as corroboration. The Crimes Decree provides that corroboration is required in cases of perjury or subornation. The following considers the law of corroboration in Fiji and how that has changed over the years.

Complainants in Sexual Offence Cases

In sexual offences under common law, there is no requirement of compulsory corroboration but the requirement is that it is dangerous to convict on the uncorroborated evidence of the complainant². In cases where there is no corroboration the Trier of fact must warn himself or herself that he or she is aware that it is dangerous to convict without corroboration before they convict the accused.³

In the case of *Khan v R* (1973) 19 FLR 133 where the accused had allegedly raped his 14 year old daughter, the Court held that the evidence of the complainant is taken to be corroborated by the confession of the accused. The requirement of corroboration was followed in many other cases in Fiji till 2009 when the case of *Balelala v State* was decided.

In the case of *Balelala v State* [2004] FJCA 49, the Court of Appeal dismissed the requirement of corroboration and stated that it was discriminatory against women and contradicting the Bill of Rights manifested in the Constitution.⁴

Then with the introduction of the **Criminal Procedure Decree 2009** of Fiji the law on corroboration in sexual offences cases became crystal clear. **Section 129** of the **Criminal Procedure Decree 2009** states that there is no requirement of corroboration in sexual cases. That where a person is charged for a sexual offence, no corroboration of the complainant's evidence shall be necessary for that person to be convicted and neither the Judge or the

² *Khan v R* (1973) 19 FLR 133

³ Above, n 2

⁴ *Balelala v State* [2004] FJCA 49 <http://www.paclii.org> (Accessed 29/03/2011)

Magistrate are required to give any warning to the assessors relating to the absence of corroboration.⁵

Thus now there is no requirement for corroboration in sexual offence cases to support the complainant's evidence. The evidence of the complainant alone suffices and the Court does not need to warn itself or the assessors on the dangers of convicting the accused on the uncorroborated evidence of the complainant. This was applied in the case of *State v Swamy* [2010] FJMC 165 whereby the Court stated that corroboration is no longer required in sexual offence cases.⁶ Equal rights and freedom against all forms of discrimination are actually seen to be practiced by the courts when dealing with evidence from witnesses.

Unsworn Evidence of the Child

Convicting an accused person on the unsworn evidence of a child has always been considered very cautiously by the Courts. The Courts usually require corroboration of the unsworn evidence of a child or the Judge has to warn himself or herself that it is dangerous to convict the accused without any corroborating evidence on the unsworn evidence of the child but they still would go ahead and do so due to the evidence before them as the case may be. Fiji has moved away from the common law position and have allowed children to give unsworn evidence and treat them as unsworn evidence of an adult or give them the same weight.

Under the common law, the Courts have been reluctant to convict a person on the unsworn evidence of the child. It may arise from the general perception that young children tend to make up stories or that they can be influenced to tell a story against someone. However there may be cases where the child may be a victim of a crime or an eye witness and their evidence may be crucial to the case, so what can be done in such situations?

In Fiji, the unsworn evidence of the child was discussed in the case of *AG v Gopal* (1967) 13 FLR 65 whereby the Court held that the child gave unsworn evidence and identified the accused therefore corroboration of the child's identification of the accused was required. The Court did not state the reason why it required corroborative evidence of the identification of the accused but it can be presumed that at that time the Juveniles Act had the specific

⁵ Section 129 of Fiji Criminal Procedure Decree 2009, <http://www.pacii.org> (Accessed 29/03/2011)

⁶ *State v Swamy* [2010] FJMC 165 <http://www.pacii.org> (Accessed 29/03/2011)

requirement under section 10 that no accused was to be convicted solely on the unsworn evidence of a child. The court stated that the accused had lied to the police when he said before his arrest that he had no opportunity to commit the offence. The Court resorted to the English case of *Credland v Knowler* (1951) 35 Cr. App. R 45 and quoted:

“[A] lie told to the police may be corroboration if it gives rise to an inference in support of the complainant’s evidence or if it gives a different complexion to the opportunity to commit the offence. The magistrate should therefore have decided whether the lie was proved and then determined if it was corroboration.”⁷

Section 10 of the Juvenile Act of Fiji provided for evidence given by children to be corroborated. However in the case of *State v AV* [2009] FJHC 18, the Court held that section 10 of the Juveniles Act was discriminatory against children because of their age and that it deprives them the equality before the law as guaranteed by the Constitution. The Judge held :

“that if a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has is to remind the child of the importance of telling the truth before receiving his or her evidence and that evidence should be assessed like the evidence of any other witness without the need for corroboration or a warning.”⁸

Therefore the courts in Fiji now can convict people on the unsworn evidence of the child. This has been a major development in the law of corroboration in Fiji since the advent of corroboration in the courts of Fiji and is also supported by the Convention on the Rights of a Child. Similar approach has been taken in sexual offence cases and there is no discrimination towards a child who gives unsworn evidence. The rights of the child are being enforced and Fiji is setting the precedent in the South Pacific regarding the law on corroboration.

⁷ *Credland v Knowler* (1951) 35 Cr. App. R 45

⁸ *State v AV* [2009] FJHC 18 <http://www.pacilii.org> (Accessed 29/03/2011)

Evidence of Accomplice

An accomplice is a person who participated in the crime with the accused. In *Davies v DPP* [1954] 38 C App R 11, 32 the House of Lords stated who would fall within the definition of an accomplice:

“On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in case of misdemeanours). This is surely the natural and primary meaning of the term “accomplice”.⁹

The House of Lords went on to confirm three propositions. Firstly, that in a criminal trial where the person who was an accomplice gives evidence on behalf of the prosecution, then it is the duty of the Judge to warn the Jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. Secondly, that this rule has been a rule of practice but now has the force of law and thirdly, where the Judge fails to warn the Jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice.¹⁰

This rule exists for a purpose which is that their evidence may be potentially unreliable. The High Court of Australia has pointed out in the case of *Jenkins* [2004] 211 ALR 116, 121. The rule that accomplice evidence must be corroborated exists for a reason. That reason being that accomplice evidence may be unreliable and therefore the Judge does not only have to merely point out that out to the jury but need to tell them that it would be dangerous to convict the accused on the uncorroborated evidence of the accomplice.¹¹

Fiji has applied the *Jenkins* approach in the case of *Swadesh Kumar Singh v State* [2006] Crim App CAV 7/05, 19 October 2006, where the Court relied on the reasoning in the *Jenkins* case and stated that accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity and the assessors needs to be warned for the protection of the accused.

⁹ *Davies v DPP* [1954] 38 C App R 11, 32

¹⁰ Above, n 3

¹¹ *Jenkins* [2004] 211 ALR 116, 121

Fiji uses assessors instead of jury and the Judge therefore has a duty to point out to the assessors that the evidence requires corroboration as well as point out to the assessors which evidence actually goes towards corroborating the witness¹².

Furthermore, in Fiji the courts have actually also stated that lies by the accused would amount to corroboration of the accomplice's evidence. In the case of *Pillay v R* Crim Appeal 29/81 C.A, the court had an appeal from a conviction of official corruption. There were two issues the court had to consider. Firstly, if the accused had lied in his evidence and secondly the effect of his lie. In this appeal the court held that the assessors first had to decide if the accused had lied and stated that the lie could not amount to corroboration of accomplice evidence. However the more recent decisions from the Fiji Court of Appeal state that lies by accused could constitute corroboration of the accomplice evidence. In the case of *Armogam v State* [2003] FJCA 32, the Court of Appeal accepted that lies could constitute corroboration by revealing a consciousness of guilt and that this lie which constitutes corroboration needs to be specifically identified. Fiji followed the New Zealand approach in *R v Gye* 5 CRNZ 245.

The Court also pointed out that before the lies by the accused can constitute corroboration they must have some qualities as stated in the case of *Reg v Lucas (Ruth)* (1981) QB 720. The qualities that would make a lie by the accused capable of corroboration are that it must be deliberate and relate to a material issue.¹³ The motive for the lie must be a realisation of guilt by the accused or the fear of the truth and it must be clearly shown to be a lie by evidence from an independent witness.¹⁴ Another aspect is that the lie can be told in court or out of court.¹⁵ Once these qualities are established then that lie by the accused can be used as corroboration of the accomplice evidence.

¹² *Nanise Wati v The State* [2003] Crim App AAU 6/95, 19 March 2004

¹³ *Reg v Lucas (Ruth)* (1981) QB 720

¹⁴ *Reg v Lucas (Ruth)* (1981) QB 720

¹⁵ *Reg v Lucas (Ruth)* (1981) QB 720

Law on Corroboration in Vanuatu

In Vanuatu, there is no legislation that specifically deals with corroboration, however some reference to corroboration has been made by the **Criminal Procedure Act, Cap 136 of Vanuatu. Section 83, subsections (2) and (3)** of the **Criminal Procedure Act** make reference to circumstances where corroboration would be necessary and in the absence of corroboration the Judge must warn the assessors or himself before convicting accused on uncorroborated evidence. Also under **section 173** of the **Evidence Bill of Vanuatu 2003** there is provision for corroboration in respect of perjury cases and where evidence is given by unsworn evidence of someone lacking capacity. Corroboration is required under **section 59 of the Penal Code** of Vanuatu in cases of treason. The common law is being followed mainly in relation to when and how corroboration is required and applied. In the case of *Walker v Public Prosecutor* [2007] VUCA 12, the court stated in paragraphs 10 and 11 that the legal position at common law is that one witness is sufficient however assessors and judges need to be warned of the dangers of convicting without corroboration in cases of evidence by accomplice, evidence by complainant in sexual offence case and unsworn testimony of a child.¹⁶ These are considered in detailed below.

Complaints in Sexual Offence Cases

In Vanuatu in the case of *Public Prosecutor v Michael Mereka* [1989-94] VLR 613 there was an appeal by the prosecution on the decision of the Magistrate who had dismissed the charge at the prima facie stage on the grounds that there was no recent complaint and no corroboration, both of which he considered were mandatory. In fact neither is required although both are admissible. The error of the Magistrate shows how a no case submission is not about proof but only the existence of a prima facie case with some evidence going to each element of the offence. The Court went on length to deal with the issues of recent complaint and corroboration. The Judge cited the English cases of *DPP v Kilbourne* [1973] AC 729 and *DPP v Boardman* [1975] AC 421.

The following was observed from the decision and has been clearly followed by the Courts in Vanuatu in sexual offences. Firstly, that a person can be convicted of a sexual offence in the

¹⁶ *Walker v Public Prosecutor* [2007] VUCA 12 <http://www.paclii.org> (Accessed 29 March 2011)

absence of corroboration.¹⁷ Secondly, that the requirement for convicting without corroboration is that the Trier of fact be warned of the danger of doing so.¹⁸ Thirdly, the evidence of recent complaint cannot be corroboration.¹⁹ Fourthly, the compliance with the requirement that the corroborative evidence must come from a source which is independent of the witness whose evidence is to be corroborated.²⁰ Fifthly, corroborative evidence must be independent testimony which affects the accused by connecting or tending to connect him with the crime as was stated in the case of *Baskerville* [1916] 2 K.B. 658. Finally the Court considered that at common law there is no absolute requirement for corroboration in relation to any offence although there may be statutory requirements.

Similarly in the case of *Public Prosecutor v Toka* [2001] VUSC 59, the Judge stated the importance of corroboration in sexual offences and that he must warn himself that it is dangerous to convict on the uncorroborated evidence of the complainant. He found the statement made by the accused to the police as corroboration.

Moreover, in the case of *Public Prosecutor v Benny* [2009] VUSC 99, Justice Clapham dealt with evidence of the child as well as evidence of the victim as both victims were children aged 7 and 8 respectively who had allegedly been sexually abused by their grandfather. The court warned itself that there was no independent corroborative evidence but yet found the accused guilty. The reason for the court's decision was that the Judge found that the victims were telling the truth and the Judge used each victim's evidence as corroboration for the other victim's story as they were present when the other got abused. The Judge noted that victims of such tender age could not make up such stories against their grandfather and were telling the truth. The Judge was satisfied that the victims were telling the truth as they gave very clear, concise, credible and reliable evidence as to the acts of the accused and were unmoved by the vigorous cross-examination and were consistent with their statements throughout²¹.

This shows the Vanuatu Courts approaching the issue of unsworn evidence of a child as was done in the case of *State v AV*²² and no need for corroboration in sexual offence cases as per

¹⁷ *Public Prosecutor v Michael Mereka* [1989-94] VLR 613 <http://www.pacii.org> (Accessed 29 March 2011)

¹⁸ Above, n 17.

¹⁹ Above, n 17.

²⁰ *Public Prosecutor v Michael Mereka* [1989-94] VLR 613 <http://www.pacii.org> (Accessed 29 March 2011)

²¹ *Public Prosecutor v Benny* [2009] VUSC 99 <http://www.pacii.org> (Accessed 29/03/2011)

²² *State v AV* [2009] FJHC 18 <http://www.pacii.org> (Accessed 29/03/2011)

Balelala's case in Fiji which has done away with the requirement for corroboration in relation to unsworn evidence of the child and complainant respectively. Vanuatu's Constitution also provides for the rights of the child and rights of children and women against any form of discrimination. It is only for a matter of submission by Counsel and the Courts to rule that the common law approach for corroboration in sexual offences and unsworn evidence of child is discriminatory and contradicting the provisions of the Constitution and therefore void to the extent of inconsistency.

Unsworn Evidence of the Child

In Vanuatu the Courts are guided by the statute. **Section 83(3) of the Vanuatu Criminal Procedure Code** provides for the requirement of corroboration in the case of unsworn evidence of a child. It states:

“(3) Where evidence admitted by virtue of subsection (2) is given on behalf of the prosecution in any proceedings, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by other material evidence.”²³

So the child does know the meaning of telling the truth but may not know he will be punished by a divine authority if he lied. Emphasis has been added to the requirement of a child's unsworn evidence to be corroborated in Vanuatu before a person can be convicted on that evidence.

²³ 83. (1) Subject to subsection (2) and save as otherwise provided, every witness in any criminal cause or matter shall be examined upon oath and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

(2) Where any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, although not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(3) Where evidence admitted by virtue subsection (2) is given on behalf of the prosecution in any proceedings, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by other material evidence.

Again the case of *Public Prosecutor v Benny* [2009] VUSC 99 is applicable where the Court regarded each complainant's evidence as corroboration of the unsworn evidence of each child. The Court did consider that the children were telling the truth and the court believed their evidence. This shows that the Judge was inclined to follow the approach Fiji has taken but did not go any further and left the matter only as far as the children were telling the truth. There is room however in Vanuatu to declare any law as void which would amount to discriminate the child from giving evidence in a court of law.

Evidence of Accomplice

In Vanuatu, the court has used corroboration in weighing cases where there is no statutory rule or rule of practice concerning corroboration that pertains to that case. In the case of *Vanuatu Public Prosecutor v James Samuel Cr 375/82*, whereby there was conflicting evidence by the complainant and the accused and the Magistrate used the dentist's evidence, who had seen the victim's distressed state when the victim had come to the dentist and gave evidence of that as corroboration to the complainant's evidence. There was no need for corroboration in this case, however the court went ahead and used it to give more weight to the victim's evidence.

Also in Vanuatu where there is no evidence but the disputed confession of the accused then the courts have decided that there must be corroborative evidence going towards the confession. In the case of *Vanuatu (New Hebrides) Procurator General v Jaques Pala District Court No. 654 of 1979*, the accused was charged with theft of food from a house. When arrested the accused made a confession in Bislama. It was later translated in French. **Section 151 of the Criminal Procedure Code** Rules excludes confessions that are not written in the language they are given in. The Court also noted that in the case where the accused retracts a statement, even if it was given voluntarily, it is dangerous to convict on the basis of the statement alone without corroboration.²⁴

²⁴ *Vanuatu (New Hebrides) Procurator General v Jaques Pala District Court No. 654 of 1979*

Conclusion

From the above it can be clearly seen how the common law approaches have been applied in the Pacific Island countries specifically Fiji and Vanuatu and how they have changed their approaches or the law over the years. Fiji started off with the common law on the law of corroboration and now has done away with the corroboration requirement in sexual offence cases (Balelala's case) and unsworn evidence of the child (State v AV) as the corroboration requirement is discriminatory and inconsistent with the provisions of the Constitution of Fiji. Vanuatu however still follows the common law and has included those common law principles in its legislation and applying them case by case. It does seem however from the recent decisions from the courts of Vanuatu such as Benny's case that they too may very soon follow the footsteps of Fiji and declare any law regarding corroboration unconstitutional if it is discriminatory against the women or children of Vanuatu.

The changes made by legislation are very relevant to all the other common law jurisdictions. As time passes the country may feel the need to legislate on some forms of evidence in order to have them admitted in court without significant debate and objections. Therefore Fiji has set the example in the South Pacific region for the Pacific island nations to override the common law requirements by statute or override it by recent comprehensive court decisions which now form precedents. Evidence law evolved through common law and now common law countries can direct its course by legislating provisions which they feel are required to deal with evidence in their countries.

Bibliography

Books

1. Peter Murphy, *Murphy on Evidence* (7th ed, 2000) 544

Legislation

2. *Evidence Act* [Cap 41] (Fiji)
3. *Evidence Bill* (Vanuatu)
4. *Crimes Decree 2009* (Fiji)
5. *Criminal Procedure Decree 2009* (Fiji)
6. *Juveniles Act* [Cap] (Fiji)
7. *Penal Code* [Cap 135] (Vanuatu)
8. *Criminal Procedure Code* [Cap 136] (Vanuatu)

Cases

9. AG v Gopal (1967) 13 FLR 65
10. Armogam v State [2003] FJCA 32
11. Balelala v State [2004] FJCA 49 <http://www.paclii.org> (Accessed 21 March 2011)
12. Baskerville [1916] 2 K.B. 658.
13. Credland v Knowler (1951) 35 Cr. App. R 45
14. Davies v DPP [1954] 38 C App R 11, 32

15. Jenkins [2004] 211 ALR 116, 121
16. Khan v R (1973) 19 FLR 133
17. Nanise Wati v The State [2003] Crim App AAU 6/95, 19 March 2004
18. Pillay v R Crim Appeal 29/81 C.A
19. Public Prosecutor v Michael Mereka [1989-94] VLR 613 <http://www.paclii.org> (Accessed 29 March 2011)
20. Public Prosecutor v Benny [2009] VUSC 99 <http://www.paclii.org> (Accessed 21 March 2011)
21. Public Prosecutor v Toka [2001] VUSC 59
22. Reg v Lucas (Ruth) (1981) QB 720
23. State v AV [2009] FJHC 18 <http://www.paclii.org> (Accessed 21 March 2011)
24. State v Swamy [2010] FJMC 165 <http://www.paclii.org> (Accessed 21 March 2011)
25. Swadesh Kumar Singh v State [2006] Crim App CAV 7/05, 19 October 2006
26. Vanuatu (New Hebrides) Procurator General v Jaques Pala District Court No. 654 of 1979 <http://www.paclii.org> (Accessed 29 March 2011)
27. Walker v Public Prosecutor [2007] VUCA 12 <http://www.paclii.org> (Accessed 29 March 2011)